would sustain a finding that the railroad company ought to have known the unfitness and recklessness of Kirwin and in law had notice thereof. A state of facts proven which show that the railway company ought to have knowledge of the conduct of an employee presumes notice and is evidence of notice. As to the other matters submitted in favor of sustaining the motion for judgment for plaintiff in error, it is sufficient to say that the general verdict fully covers all of said objections, and that the court committed no error in overruling the same.

In this case the evidence was very conflicting upon every material point, excepting as to the injuries received by Doyle, yet as there was testimony tending to support the verdict which would be sufficient therefor, if it was not contradicted by other testimony, and as the District Court has approved the verdict, we cannot reverse the judgment and order a new trial on the ground that the verdict is not sustained by sufficient evidence. Our view of the weight of evidence might differ very widely from that of the trial jury, but we have no right to usurp their powers, after a trial judge has approved their verdict: *The American Bridge Co.* v. *Murphey*, 13 Kans. 35, and the authorities there cited.

The judgment of the court below will be affirmed, all the justices concurring.

United States District Court. Southern District of New York.

CHARLES H. MARSHALL AND OTHERS *v.* THE STEAMSHIP ADRIATIC.

While it is in general the duty of a steamer to keep out of the way of a sailing vessel, it is, on the other hand, equally the duty of the latter to allow the steamer to keep out of her way and not to embarrass or hamper her in so doing.

A steamer going at twelve knots and a sailing ship going about eight or nine knots, approached each other upon opposite courses, in such position that the ship's green light only was visible from the steamer at about two points on her starboard bow; the steamer kept on her course without change for four minutes, until the ship's green light had opened to three and a half points on the steamer's starboard bow, when the ship shut in her green light and exposed her red, whereupon the steamer ported her helm and slowed; in about a minute and while the steamer was swinging to starboard under her port helm, the ship shut in her red light and again exposed only the green, whereupon the steamer reversed her engines, but not in time to avoid a collision. *Held*, that the ship was entirely in fault.

Under such circumstances where the vacillating course of one vessel imposes on the other, a second or third time, the duty of avoiding her, and the danger of col-

lision is imminent, very much must be conceded to the judgment of the navigator of the latter, and he should not be held in fault for his course unless it is shown that it was such as to indicate that there was no fair exercise of reasonable judgment and skill in adopting it.

IN admiralty. On the 30th of December 1875, the ship Harvest Queen, an American vessel, belonging to the libellants, with a cargo on board also belonging to them, set sail from the harbor of Queenstown, in Ireland, for Liverpool, in England. The steamer Adriatic, a British vessel, sailed from Liverpool for New York on the same day, and proceeded down the Irish Channel. The libel alleged that when the ship was distant about fifty miles from her place of departure, and was proceeding up the Irish Channel, the wind blowing a stiff breeze from about south-west, and the weather being clear starlight, she was run into by the steamer at about three o'clock A. M., on the 31st of December, the steamer striking the ship on her port bow, with such violence as to cause her, with her cargo, to sink in a very short time after the collision; that, by said collision, the ship was totally lost, and her master and officers and all hands on board of her were lost; that, prior to, and at the time of the collision, the general course of the ship was up, and the general course of the steamer was down, the Irish Channel, and their courses crossed but slightly, if at all; and that the collision was caused by the negligence and improper conduct of those on board of the steamer, in not having a good and sufficient look-out, in running at too great a rate of speed, in not keeping out of the way of the ship, and in not stopping and backing in time to avoid the collision. The libellants claimed to recover against the steamer, as damages sustained by the collision, the sum of $225,000.

The answer of the steamer averred that the ship was either sunk by a collision with some other vessel than the steamer, in the Irish Channel, on or about the 31st of December, or was wrecked on or about that day in said Channel, and that her loss was caused thereby, and not by any collision with the steamer.

Thomas B. Stillman and *Henry J. Scudder*, for libellants.

Everett P. Wheeler and *Joseph H. Choate*, for claimants.

BLATCHFORD, J.—Without discussing in detail the evidence, it is sufficient to say that it leaves no doubt in the mind that the steamer, at or about the time and place charged, came into collision

with the ship Harvest Queen, belonging to the libellants, in such manner and with such results as to cause the sinking and loss of the ship and of her cargo, and of every person on board of her.

The material question in the case to be determined on the evidence is, as to whether the steamer was in fault. The vessels were sailing on nearly opposite courses. The steamer was heading from west one-quarter north to west one-half north. The ship was heading about east by south half south. They were thus drawing on to the courses of each other from one point to one point and a quarter. The ship was sailing at the rate of from eight to nine knots an hour and the steamer at the rate of about twelve knots. The steamer made the green light of the ship at about two points on the starboard bow of the steamer. The red light of the ship was not then visible to the steamer. The white and green lights of the steamer, and not her red light, ought then to have been visible to the ship, and undoubtedly were, and it was her duty to heed them. Under the circumstances thus existing it was the duty of the steamer to keep out of the way of the ship, and it was the correlative duty of the ship to allow the steamer to keep out of her way, and not to embarrass or hamper the steamer in performing such duty. The position was one of safety. The green lights of the two vessels, and only those, were exposed to each other. There was no exposing of green to red. Under this condition of things the steamer kept on her course, neither porting nor starboarding, nor slowing, nor stopping, nor reversing. It was proper for her so to keep on her course. She had a right to presume that in the presence of her exposed green light, the ship would continue to expose her green light and that only. There was no obligation on the steamer then to starboard, because the vessels were at such a distance apart, probably two miles, that if both kept their courses, the ship was certain to pass clear, on the starboard hand of the steamer. She would draw more and more on the starboard bow of the steamer. And such was the fact. The ship's green light opened more to the starboard of the steamer, until it got to be some three and a half points on the starboard bow of the steamer. This was a position of safety. The ship would not reach the path of the steamer until she was astern of the steamer. At this juncture, and some four minutes after the ship's green light had first been seen by the steamer, the ship shut in her green light, and exposed her red

light. All the time before that she had exposed her green light, and that alone, steadily, with no glimpse of her red light. Here then arose an exigency. Here was danger. The first officer of the steamer, Mr. Bence, was on her bridge, watching the green light off his starboard bow. He had charge of the steamer at the time, and was responsible for her navigation. He had seen the green light for four minutes, and had seen it thus open more on his starboard bow. He could not tell to what species of craft it belonged, whether to a fore and aft vessel, which could sail within five points of the wind, or to a square-rigged vessel, which could not sail nearer to the wind than from six to seven points. He saw a movement in the approaching vessel, indicated by the change in her lights, which it was reasonable and proper for him, under the circumstances, to take as evidence of her intention to throw herself across his onward path. He was called upon suddenly and in an exigency, to determine whether he would do anything, and, if something, what. He could, as to the course of his vessel, do one of three things—either let it remain as it was, or starboard, or port. He ported. The libellants insist that he erred in porting; that, if he had not ported, there would have been no collision; that he ought to have starboarded, or at least have kept on the same course; that if he had even kept his course there would have been no collision, as the ship could not have reached his path ahead of him; and that if he had starboarded he would certainly have sailed away from all danger. It is easy to criticise and to be wise after the event. Mr. Bence seems to have been a good seaman, of experience and capacity; watchful, thoughtful, and deliberate. Much must be left to the judgment of such a man, charged with the safety of a large steamer, and of the lives of those on board, as to which one of two or more methods he will adopt in a given exigency, if it is not shown that the one he adopted was such as to indicate that there was no fair exercise of reasonable judgment in concluding to adopt it. By determining to port and throw the head of the steamer to starboard, Mr. Bence took a course which would certainly, if the approaching vessel continued to display only her red light, very soon bring the two vessels on parallel courses, with their red lights exposed to each other. That was safety. To take that course was prudent, and, at the distance apart the two vessels were, it would have been successful, if the ship had continued to

expose only her red light. The steamer's duty of avoiding the ship did not cease because the ship shut in her green light and exposed her red light. It continued in the altered circumstances. As the exigency was sudden and unforeseen, and as the vessels were nearing each other rapidly, promptness of decision and action on the part of steamer was necessary. Even if the ship had continued to expose only her red light, the steamer might, it may be conceded, have passed her in safety by going on at the same speed as before, without starboarding or with starboarding. But I think it quite clear that if the ship had continued to expose only her red light, the steamer would, having ported, have equally avoided a collision with the ship, especially as, on the weight of the evidence, the steamer's engines were slowed at the time her helm was ported. The steamer adopted this manœuvre of porting and slowing deliberately and wisely. There was no apparent necessity at that time that she should stop and reverse her engines. She discharged her duty of avoiding the ship by proper movements, for the second time. She did this, although the ship was in fault in her movements, in the presence of what she could and should have seen was a steamer.

These movements of the steamer had been made, and she was swinging to starboard, under her port helm, when the ship shut in her red light, and exposed only her green light. Seeing this confusion of purpose in the ship, the engines of the steamer were stopped and reversed at full speed. This was proper. There was nothing else for the steamer to do. The ship had twice turned from a course and position in reference to which the steamer had acted, and acted in a way which would have given safety to the ship.

Whatever followed, the ship had brought upon herself. For what ensued after the ship exhibited her green light the second time the steamer was not responsible. Before the collision the ship made another change, and shut in her green light, and showed only her red light.

A strenuous effort was made on the part of the libellants to induce the belief that the changes by the ship from green to red and from red back to green were produced by the yawing of the ship in the following sea and with the free wind. But it is impossible to believe this, for the green light was visible at first, alone, for four minutes, continuously, with no glimpse of the red light, and the green light

opened from two points on the starboard bow of the steamer to three and a half points on the same bow before the red light appeared. The effects of yawing would have been sooner observed.

It is earnestly contended, for the libellants, that the red light of the ship, because of which the steamer ported, was in sight for only one minute, and that when the green light of the ship again appeared, the steamer should have kept going ahead, and should have starboarded. The ship was a third time, and in a third position, imposing on the steamer the duty of avoiding her, after the steamer had twice assumed and discharged that duty. The distance between the vessels was diminishing fast, and with this erratic vessel nearly ahead, and the danger of collision apparent and imminent, it was the highest duty of the steamer to stop and reverse her engines. She did so, and her engines were reversed at full speed, and, on the evidence, she had got sternway on at the time of the collision. If it were to be conceded that the stopping and reversing was an error of judgment, it could not be held to have been a fault, occurring, as it did, after what had previously happened, but would be regarded as an error which the libellants could not make a ground of complaint. But it is not to be admitted that it was an error of judgment.

Although the court is asked to condemn the movements of the steamer, no testimony of any expert in seamanship or in navigation is adduced to show that such movements were faulty, or unwise, or imprudent, or unintelligent. The case of the libellants seems to rest on the proposition that it was the duty of the steamer to keep out of the way of the ship, and that it is not established that the ship changed her course. But the steamer could act only in view of what she saw, and of what she had a right reasonably to infer from what she saw. Her movements were taken with a reasonable certainty that they would give safety to both vessels. She exercised the highest degree of diligence imposed by the law, in her efforts to avoid the ship. She exercised that diligence discreetly throughout to the end, in all the emergencies which the vacillating movements of the ship threw upon her.

The libel is dismissed with costs.